

BMS

BUREAU OF MEDIATION SERVICES

State of Minnesota

**IN THE MATTER OF A PETITION
FOR CLARIFICATION OF AN
APPROPRIATE UNIT**

June 19, 2015

Independent School District No. 622, North St. Paul-Maplewood-Oakdale,
North St. Paul, Minnesota

- and -

North St. Paul-Maplewood-Oakdale Education Association, North St. Paul, Minnesota

BMS Case No. 15PCL0186

UNIT CLARIFICATION ORDER

INTRODUCTION

On September 12, 2014 a petition was filed with the State of Minnesota, Bureau of Mediation Services (Bureau or BMS) by the North St. Paul-Maplewood-Oakdale Education Association, North St. Paul, Minnesota (Association). The petition requested clarification of the bargaining unit status for the position of Pre-Kindergarten Instructor employed by Independent School District No. 622, North St. Paul, Minnesota (District).

A hearing was conducted by the Bureau on January 9, 2015. The hearing was closed upon timely receipt of post-hearing briefs filed by both parties on January 19, 2015.

APPEARANCES

At the hearing, Mr. David Aron, Attorney-at-Law, appeared on behalf of the Association and Ms. Karen Kepple, Attorney-at-Law, appeared on behalf of the District.

AGREEMENTS OF THE PARTIES

At the hearing, the parties stipulated to the following:

1. The preschool job description (Joint Exhibit 3) is the same for all preschool instructors currently working in the District.
2. All instructors currently employed in the preschool program are “public employees” within the meaning of the Public Employment Labor Relations Act (PELRA).
3. The only issue in dispute in this case is whether the preschool positions are positions that require a teaching license, as defined in Minn. Stat. 179A.03, Subd. 18.

ISSUE

The issue before the Bureau is: Does the Pre-Kindergarten Instructor position require a teaching license, as defined in Minnesota Statute 179A.03, Subd. 18?

POSITION OF THE PARTIES

The Association argues the Pre-Kindergarten Instructor (Instructor) position job duties are quintessential teacher job duties. They further assert that positions with those job duties are required, either by a school district or the Minnesota Department of Education (MDE), to be filled by individuals who hold an appropriate teaching license according to state statute and rules. They also contend the District has unofficially continued to require that licensed teachers fill these positions and hired only those with licenses to fill the full-time positions and only the non-licensed Instructor works part-time. The Association also claims the use of Federal Title I dollars to fund two (2) of the current Pre-Kindergarten Instructor positions imposes a requirement of licensure on the position. Finally, the Association contends the MDE’s statements about licensing requirements for Pre-Kindergarten Instructor positions are erroneous based on a misreading of both Minnesota Statutes and guidance from the U.S. Department of Education.

The District’s position is teacher licensure is required only for positions included in the Compulsory Instruction Statute, Minnesota Statute 120A.22, which covers only elementary and secondary education. The District notes the statute governing School Readiness Programs, MN Statute 124D.15 (Statutory & Regulatory Authorities Exhibit 3), includes a list of competencies required of teachers that does not include state licensure. In addition, the District contends that none of the funding used for the Pre-Kindergarten Instructor positions give rise to a legal obligation to have licensed teacher positions. While acknowledging inconsistent opinions obtained by the District and Association in earlier contacts with the MDE, the District contends

that the testimony of Richard Wassen, Director of Licensing for MDE at this hearing, provides clear guidance on the issue of licensing requirements for the Pre-Kindergarten Instructor positions at the District.

BACKGROUND

For the past several years the District has offered early childhood education opportunities through two programs: one a Community Education Based program called Stepping Stones and one a School-Based program. The School Based program was developed through a task force during 2008 and 2009 with the first two classrooms opening in 2011-2012. A third school-based classroom was added for the 2013-2014 school year. The mission for both programs is to make sure students are prepared to enter kindergarten with the skills needed to successfully learn and perform at high levels. Currently the school-based program is staffed by six Pre-Kindergarten Instructors -- five (5) of the incumbents hold teaching licenses through the MDE and one (1) incumbent is not licensed. The District's goal is to merge the two programs into one unified program during the upcoming school year.

The Association and District have defined the appropriate unit in their collective bargaining agreement (Joint Exhibit 1) in Article II Recognition of Exclusive Representative, Section 2. Appropriate Unit to be:

Teacher shall mean all professional employees of Independent School District No. 622, Maplewood, Minnesota, who are required to be and are certificated or licensed by the State Board of Education, or the State Board of Teaching, and also including school social workers, school nurses, interns, physical therapists and occupational therapists, and including those on approved leaves of absence, excluding the superintendent, assistant superintendents, directors, associate directors, assistant directors, principals, assistant principals, confidential employees, activity directors, Chapter I Coordinator, or any substitute teacher who does not replace an absent teacher for more than 30 working days.”

Prior to the 2014-2015 school year, the District was developing and refining the Pre-Kindergarten Program and the duties and responsibilities of the Pre-Kindergarten Instructors. Instructors working with the Program were required by the District to be licensed by MDE and were included in the bargaining unit represented by Association.

Beginning with the 2014-2015 school year, the District modified the position of Pre-Kindergarten Instructor by changing the license requirement to a desired but not required qualification. At that point, the District made the decision that the position was no longer part of the Association bargaining unit as those holding the position were not required to be licensed by the MDE.

APPLICABLE STATUTES AND STANDARDS

Minn. Stat. §179A.03, Subd. 18 (2014) (Statutory & Regulatory Authorities Exhibit 1) defines “teacher” as follows:

...any public employee other than a superintendent or assistant superintendent, principal, assistant principal, or a supervisor or confidential employee, employed by a school district:

(1) in a position for which the person must be licensed by the Board of Teaching or the commissioner of education, or

(2) in a position as a physical therapist, occupational therapist, art therapist, music therapist or audiologist.

Minn. Stat. §124D.15 (2014) (Statutory & Regulatory Authorities Exhibit 3) establishes School Readiness Programs and states in part:

Subdivision 1. Establishment; purpose. A district or a group of districts may establish a school readiness program for children age three to kindergarten entrance. The purpose of a school readiness program is to prepare children to enter kindergarten.

Subd. 3. Program requirements. A school readiness program provider must:

(1) assess each child’s cognitive and language skills with a comprehensive child assessment instrument when the child enters and again before the child leaves the program to improve program planning and implementation, communicate with parents, and promote kindergarten readiness;

(2) provide comprehensive program content and intentional instructional practice aligned with the state early childhood learning guidelines and kindergarten standards and based on early childhood research and professional practice that is focused on children’s cognitive, social, emotional, and physical skills and development and prepares children for the transition to kindergarten, including early literacy and language skills;

(3) coordinate appropriate kindergarten transition with parents and kindergarten teachers;

(4) involve parents in program planning and decision making;

(5) coordinate with relevant community-based services;

(6) cooperate with adult basic education programs and other adult literacy programs;

- (7) ensure staff-child ratios of one-to-ten and maximum group size of 20 children with the first staff required to be a teacher; and
- (8) have teachers knowledgeable in early childhood curriculum content, assessment, native and English language development programs, and instruction.

Minn. Stat. §124D.13 (2014) establishes Early Childhood Family Education (ECFE) programs and states in part:

Subdivision 1. Establishment; purpose. A district that provides a community education program under sections 124D.18 and 124D.19 may establish an early childhood family education program. Two or more districts, each of which provides a community education program, may cooperate to jointly provide an early childhood family education program. The purpose of the early childhood family education program is to provide parenting education to support children's learning and development.

Subd. 2. Program requirements. (a) Early childhood family education programs are programs for children in the period of life from birth to kindergarten, for the parents and other relatives of these children, and for expectant parents. To the extent that funds are insufficient to provide programs for all children, early childhood family education programs should emphasize programming for a child from birth to age three and encourage parents and other relatives to involve four- and five-year-old children in school readiness programs, and other public and nonpublic early learning programs. A district may not limit participation to school district residents. Early childhood family education programs must provide:

- (1) programs to educate parents and other relatives about the physical, cognitive, social, and emotional development of children and to enhance the skills of parents and other relatives in providing for their children's learning and development;
- (2) structured learning activities requiring interaction between children and their parents or relatives;
- (3) structured learning activities for children that promote children's development and positive interaction with peers, which are held while parents or relatives attend parent education classes;

...

Subd. 11. Teachers. A school board must employ necessary licensed teachers for its early childhood family education programs. The Board of Teaching, at its discretion, may grant an applicant a variance under this subdivision, consistent

with sections 122A.09, subdivision 10, and 122A.25, and Board of Teaching Rules.

Minn. Stat. §122A.16 (2014) establishes the definition of a Highly Qualified Teacher as:

(a) A qualified teacher is one holding a valid license, under this chapter, to perform the particular service for which the teacher is employed in public school.
(b) For the purposes of the federal No Child Left Behind Act, a highly qualified teacher is one who holds a valid license under this chapter, including under section 122A.245, among other sections and is determined by local administrators as having highly qualified status according to the approved Minnesota highly qualified plan. Teachers delivering core content instruction must be deemed highly qualified at the local level and reported to the state via the staff automated reporting system.

In Education Cambridge-Isanti, Cambridge, Minnesota and Independent School District No. 911, Cambridge-Isanti, Cambridge, Minnesota, BMS Case No. 01PCL0953 (2002) the Bureau discussed prior Bureau and Court decisions concerning the issue at hand:

In Hibbing Education Association v. Public Employment Relations Board, C5-83-1580, (Minn.1985), the Minnesota Supreme Court held that paraprofessionals providing significant educational services were not “teachers” under PELRA. The Court wrote: “Notwithstanding presentation of considerable evidence that these paraprofessionals in the district made many decisions with respect to educational techniques to be used, developed plans and teaching materials, and performed other functions traditionally performed by teachers, the fact remains that they did not occupy positions for which licensure was mandated by the board of teaching or the state board of education.”

In the face of argument that such a holding invites “abuse” by school administrators, the Hibbing Court held, “such complaints should be directed to the board of teaching or the board of education. These state agencies possess both the jurisdiction and the expertise to decide which positions should be held only by licensed teachers. (Internal citation omitted).”

Similarly in Minneapolis Federation of Teachers, Local No. 59, Minneapolis, Minnesota and Special School District No. 1, Minneapolis, Minnesota, BMS Case No. 89PR2056 (1988) the Bureau state that it cannot consider job duties or responsibilities of a position to determine whether a position or employee is a “teacher” as defined by PELRA.

DISCUSSION

The District and the Association agreed that six people were employed as teachers in two programs the District identified as (1) Stepping Stone and (2) Building Based. The program's objective was to develop a hybrid or combination of the two programs. The entire project was in the developmental stage. Different programs were used as funding streams; School Readiness; Early Childhood Family Learning (ECFL) and Title 1.

The parties stipulated that witness Richard Wassen, MDE Director of Licensing, was an expert witness in Minnesota teacher licensing requirements. Mr. Wassen testified that Minn. Stat. 120A.22 (2014) requires compulsory education for children between the ages of seven and seventeen years of age and children under age seven enrolled in a kindergarten program. He testified that instructors working in a compulsory educational environment are required to hold a valid Minnesota teaching license in the field and for the grade levels they are teaching. He further testified that education for children under age seven prior to enrollment in a kindergarten is a voluntary endeavor left to the decision making of each school district.

Director Wassen testified, "To determine if a position requires a license, MDE uses the position description, Minnesota Statutes, Minnesota Rules and duties assigned to the employee. Mr. Wassen stated, sometimes the rules and statutes do not always work together. It must be noted MDE does not create all license requirements for every school district. Independent school districts reserve the right to determine if the position should be filled by a licensed teacher.

Kristen Longway and Nikole Kostuch, former Pre-Kindergarten teachers for the District and Peter Mau, Supervisor of Education Programs, outlined the establishment of a pre-kindergarten program for the District through a task force process. Mr. Mau testified that even though the District always considered licensure to be optional, the program was initially established to include a licensure requirement in the hopes of attracting teachers who had been part of the task force to become instructors. Ms. Longway and Ms. Kostuch, both licensed teachers, were hired as the initial cadre of instructors for the District's pre-kindergarten program. Ms. Longway and Ms. Kostuch testified that the major areas of accountability and skill requirements for pre-kindergarten instruction and kindergarten instruction are very similar. In addition, while employed as a Pre-Kindergarten instructor for the District they reported along the same lines of authority as other teachers, attended staff meetings, participated in staff development and were treated in all respects as teachers under the collective bargaining agreement. Ms. Longway and Ms. Kostuch reviewed the Pre-Kindergarten Instructor Job Description (Joint Exhibits 3 and 3A) and indicated there was no significant change in the major areas of accountability from the 2013-14 school year when they held the position to the present school year. Both left the District for other employment at the end of the 2013-2014 school year.

The decision to change the license requirement from required to desired was discussed in testimony by Mr. Mau, Ruth Paisley, Early Learning Supervisor, and Keith Gray, Human Resources Director. They testified that they consulted with MDE staff about the licensure requirement and the District belief that other areas of expertise such as social work and family life could add value to the program. In addition Mr. Gray testified that having positions outside of the bargaining unit would provide the District with flexibility in scheduling, defining job duties and in addressing potential licensing implications if there were changes in the student population requiring realignment of staff. Association witness Allan Rieper, Association's Membership Rights Chair testified that the Association did not become aware of the change in licensure requirement until the job posting (Joint Exhibit 3/3A) on May 30, 2014. Mr. Rieper testified that he talked to Human Resources about concerns about the change in licensure status and removal of the position from the bargaining unit.

It is clear from the e-mail exchanges between the District and MDE and between the Association and MDE (Joint Exhibit 7) that conflicting guidance was provided to the parties concerning whether licensure was required for the District's Pre-Kindergarten Instructor position. Association witness Rebecca Hamblin, Field Representative for Education Minnesota, provided testimony about her understanding of the usual process used by MDE in making licensure decisions. Ms. Hamblin discussed Association Exhibits 1, 2 and 3 which included submission of job descriptions and discussions with MDE staff. She further testified upon cross examination that licensure questions would normally be submitted to MDE and that MDE has changed its position on licensure questions from time to time in the past. When asked about Association Exhibits 1 and 2, Mr. Wassen testified that he couldn't speak to the process used under his predecessor. Instead he said that the process currently being used includes a number of factors which might include job descriptions, program funding sources and program descriptions among others. Mr. Wassen also testified that he did not agree with the e-mail response that Association received from MDE employee Katherine "Kat" Anthony-Wigle (Joint Exhibits 3 and 3A) which indicated that it appeared a teaching license for the District's Pre-Kindergarten Instructor position was required. In addition, Mr. Wassen pointed to Joint Exhibit 8 which was released by the MDE in January 2015 and is titled "Early Childhood & Parent Education Staff Guidance for STAR Reporting and Licensure Information" which states:

ECFE programs require licensed teachers, while SR does not. Both programs, however, require a licensed teacher to supervise the program.

Note that ECFE references Early Childhood Family Education and SR references School Readiness.

Mr. Mau testified that funding during the 2014-2015 school year for the District's six Pre-Kindergarten Instructor positions is currently provided via a number of funding streams,

including Title I monies for two positions, and that the specific funding streams may change from school year to school year based on the total funds available to the District. The Association contends that use of Title I funds requires that licensed teachers be employed if such funding is used. Contradictory guidance is found in the Joint Exhibit 6 from the U.S. Department of Education that provides non-regulatory guidance for serving pre-school children through Title I, and in the testimony of Mr. Wassen. Specifically, that guidance indicates that such a requirement is only applicable in states that consider pre-school as part of their public elementary education. As previously discussed, evidence shows that Minnesota does not have such a requirement. Mr. Wassen further testified that there were situations in which use of Title I funds did not automatically require the use of licensed teachers.

Testimony regarding the need to have highly qualified teachers (Statutory and Regulatory Authorities Exhibit 2) was provided by Mr. Wassen, Ms. Hamblin, and Mr. Mau. Ms. Hamblin testified that it was her understanding that teachers having Title I assignments were required to be licensed (Union Exhibit 3) and that there was a clear relationship between Minnesota rules and statutes about the requirements to teach in the Early Childhood education field (Statutory and Regulatory Authorities Exhibits 2, 3 & 4). Ms. Hamblin's interpretation of Minnesota rules and statutes is the only way to insure that highly qualified individuals are teaching in school readiness programs is licensure. Mr. Wassen and Mr. Mau testified otherwise. Mr. Wassen testified that the definition of a "highly qualified" teacher in Minnesota Statute 122A.16 (Statutory and Regulatory Authorities Exhibit 2) is a very narrow definition that does not apply to all of those providing instruction in Minnesota. He further stated that while related to licensure it is more a definition to be considered in making reports related to the federal No Child Left Behind program. Mr. Wassen also testified there are circumstances where "highly qualified" does not equate to holding a license (Joint Exhibit 6, Section C-1). Mr. Mau testified that his understanding was that the definition of "highly qualified" (Statutory and Regulatory Authorities Exhibit 2) applied only to elementary and secondary educators. He claimed that it did not apply to pre-kindergarten educators. In addition he said that he interprets guidance related to use of Title I funds provided by the US Department of Education in Joint Exhibit 6, Section C-1 to indicate that use of such funds does not equate to a teacher license requirement.

CONCLUSION

As previously discussed, to be defined as a "teacher" within the meaning of Minn. Stat. 179A.03, Subd. 18, one must be employed by a Minnesota School District, and must be in a position for which the person must be licensed by the Board of Teaching or the commissioner of education". Mr. Wassen appeared and testified on behalf of the Commissioner of Education. Mr. Wassen's testimony persuades the Bureau that the positions in question may be filled by an instructor who does not have a teaching license. The logical conclusion from this evidence is that these

positions do not require a teaching license issued by the State, and as such those filling them are not “teachers” within the meaning of Minn. Stat. §179A.03, Subd. 18.

FINDINGS AND ORDERS

1. The position of Pre-Kindergarten Instructor at Independent School District No. 622, North St. Paul-Maplewood-Oakdale, North St. Paul, Minnesota does not require a Minnesota teaching license.
2. The position of Pre-Kindergarten Instructor at Independent School District No. 622, North St. Paul-Maplewood-Oakdale is properly excluded from the bargaining unit represented by the North St. Paul-Maplewood-Oakdale Education Association, North St. Paul, Minnesota.
3. The District shall post this Order at the work locations of all affected employees.

STATE OF MINNESOTA
Bureau of Mediation Services

JOSH L. TILSEN
Commissioner



EARNEST BELTON
Hearing Officer

cc: Patricia Phillips (2)
(Includes Posting Copy)
David Aron,
Karen Kepple
Rory Sanders